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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G045595
v.	(Super. Ct. No. 09WF0269)
THANH VAN TRAN,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Thanh Van Tran of second degree murder (Pen. Code, § 187, subd. (a); all further statutory references are to this code), together with a true finding that he discharged a firearm causing death (§ 12022.53, subd. (d)). The court sentenced him to 40 years to life in prison. He raises a single claim in his appeal: the trial court erroneously sustained an objection during closing argument to defense counsel's explanation of the law relating to voluntary manslaughter. Not so. The court merely advised defendant's lawyer to "rephrase your argument a little bit." And the court properly instructed the jury on the issue. Even if the court's ruling was inappropriate, any error was cured by the instruction. We thus affirm the judgment.

In light of the issue on appeal, we need not recite all of the facts elicited at the trial. Suffice it to state that after defendant's uncle, also his close friend, was pushed to the ground during a verbal altercation, defendant shot and killed his uncle's assailant.

DISCUSSION

Section 192, subdivision (a) defines voluntary manslaughter as "the unlawful killing of a human being without malice . . . ¶ . . . upon a sudden quarrel or heat of passion." Defendant urged the jury to reduce the charge to voluntary manslaughter based on "heat of passion." His lawyer argued that there was provocation when the victim came "running over from somewhere else, and [pushed] his uncle down. . . . That's his provocation." "The provocation would have caused a person of average disposition to act rashly, and without due deliberation. That is, from passion, rather than from judgment." "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his [own] standard of conduct. You must decide whether the defendant was provoked, and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation, and knowing the same facts, would have reacted from

passion, rather than from judgment. [¶] Again, it doesn't say would have reacted by killing somebody."

At this point the prosecutor objected on the ground of misstatement of the law, stating the instruction defense counsel was discussing is "about killing." The court stated: "It does not state killing, but it is about killing. Rephrase your argument a little bit." After further argument, the court stated, "This instruction is used only in murder cases, so I think [the prosecutor] is right. Rephrase your argument a little bit." Defendant's counsel then stated: "Okay. Well, it talks about passion. So let's talk about how would you react, if in the middle of the night somebody pushes your mom down, somebody pushes your uncle down. Would you be angry at it? Would you feel intense emotion towards it? That's the question."

The clarity of defendant's lawyer's argument may leave something to be desired. But it appears her argument referred to the voluntary manslaughter instruction, CALCRIM No. 570 given to the jury.

CALCRIM No. 570 correctly states that, before a provocation would reduce the charge to voluntary manslaughter, "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." Defendant argues, correctly, that the condition would not require a finding that a person of average disposition would have killed. Therefore defendant's statement was correct but the trial court did not rule that it was erroneous; the court merely asked counsel to "[r]ephrase your argument a little bit." And, in light of the CALCRIM No. 570 instruction given to the jury, it is difficult to perceive that the quoted exchange between court and counsel would somehow have misled the jurors into thinking that they would have to conclude persons of average disposition would have killed the victim under the circumstances of this case. At worst there is some ambiguity in the exchange between court and counsel. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and

disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, . . .' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Defendant also complains about the wording of some of the prosecutor's arguments relating to provocation. Again the statements are rather confusing but, in any event, defendant failed to object, thus waiving this argument. "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) But even if defendant made an unsuccessful objection, any confusion resulting from both counsel's arguments would have been cured by the court's jury instruction.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.